

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Woodstock and Broadway, Virginia)

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1988;

Released: October 31, 1988

By the Commission:

1. The Commission has before it for consideration an Application for Review, filed by Ruarch Associates (Ruarch) permittee of FM Station WAZR, Channel 240A, Woodstock, Virginia. Ruarch requests review of the *Memorandum Opinion and Order* (Memorandum) in which the Mass Media Bureau denied a petition for reconsideration of the action returning as unacceptable Ruarch's Petition for Rule Making.

2. Originally, Ruarch filed a petition for rule making seeking the substitution of FM Channel 241B1 for Channel 240A at Woodstock, Virginia, and modification of the license of Station WAZR(FM) to specify operation on the new channel. In order to accomplish this substitution Ruarch also proposed the substitution of Channel 226A for Channel 238A at Broadway, Virginia.

3. A Commission staff engineering analysis revealed that the proposed substitution at Woodstock could not be made in compliance with the Commission's minimum spacing requirements due to a 21 kilometer (13.1 mile) short spacing to Station WHUR-FM, Channel 242B, Washington, D.C. Consequently, Ruarch's petition was returned as unacceptable because it would be necessary to impose a 23.3 kilometer site restriction from Woodstock city reference coordinates to clear Stations WHUR-FM and WHTX(FM), Channel 241B, Pittsburgh, Pennsylvania. The greatest acceptable distance for the provision of a city grade signal for a Class B1 facility would be 23.2 kilometers.<sup>1</sup>

4. In its petition for reconsideration, Ruarch, using a different site from that first proposed, claimed that there is a site from which a predicted city grade contour can be placed over Woodstock.<sup>2</sup> Ruarch stated that the required 70 dbu signal could actually be placed over Woodstock from a distance of 23.4 kilometers. Ruarch also argued that, using actual terrain conditions along the radial between its proposed site and its community of license, a 70 dbu contour would encompass the entire community of license. Ruarch further argued that although the Commission typically relies upon average terrain calculations in allotment proceedings, the Commission is empowered to consider actual terrain characteristics when making channel allotments, citing *Oak Beach and Bay Shore, N. Y.*, 57 RR 2d 1275 (1985). Lastly, Ruarch argued that its proposal presented an even more compelling case than that in *Bay Shore* for Commission consideration of terrain data,

because it was not seeking the allotment of a new channel, as in *Bay Shore*, but the upgrading of an existing facility. Therefore, Ruarch concluded, no other party could apply for the channel, and acceptance of its specific terrain data, based on a specific site, was appropriate. Ruarch further noted that from its specified site, its proposed upgraded facility would comply fully with our city coverage requirements and that it had obtained permission from the landowner and the FAA for use of the site.

5. In the *Memorandum*, the Bureau stated that the Commission does not use actual terrain conditions to predict signal coverage in allotment proceedings. Instead, we generally utilize average terrain figures which assume uniform elevation in all directions. The Bureau further stated that Ruarch's reliance on *Bay Shore* was misplaced. The Bureau noted that the Commission did not rely solely on actual terrain conditions in deciding to allot Channel 276A to Bay Shore.<sup>3</sup> It also noted that in *Bay Shore* we waived the rules requiring city grade coverage but in the instant case no waiver request was made, and that in *Bay Shore* the applicant established the unavailability of alternate transmitter sites, but in the instant case no such showing was made. Finally, the Bureau rejected Ruarch's contention that the required city grade signal would be placed at a distance of 23.4 kilometers, and that a signal at that distance would comply with our rules. Instead, the Bureau determined, using the Commission's standard prediction methods, that the predicted city grade signal fell short of the center of Woodstock by 0.1 kilometer. Because less than 50% of Woodstock would be served by the predicted signal, the Bureau found Ruarch's proposal unacceptable.

6. In its Application For Review, Ruarch first contends that the rejection of a figure of 23.4 kilometers for the distance to a predicted city grade signal for class B1 facilities constituted an erroneous finding as to a material issue of fact. Second, Ruarch argues that the Commission's decision in Woodstock conflicts with the precedent established in *Bay Shore*, where the Commission considered actual terrain data. Ruarch contends that the Commission's decision in *Bay Shore* is directly applicable, because no other use may be made of Channel 241 in the Woodstock vicinity, no alternative transmitter sites are available which will allow better signal coverage, and the proposal will generate a net increase in service to 118,620 persons. Finally, Ruarch contends that to the extent *Bay Shore* is not directly applicable, the Commission should nonetheless revise its general policy of not accepting actual terrain data in allotment proceedings in the limited circumstances presented by this case. Ruarch notes that the proposal is for an adjacent channel upgrade, and, if adopted, would not be made available for general application. Ruarch further notes that the proposal would not require a waiver at the application stage, and that it would not result in a sub-standard allotment.

DISCUSSION

7. After careful consideration of the pleadings in this case, we believe the application for review should be granted, and that the staff should accept the petition for rule making and issue a notice of proposed rule making to determine if Ruarch's proposed adjacent channel upgrade would serve the public interest. We specifically affirm the Bureau's earlier determination that, using standard prediction methods and the normal assumption in allotment proceedings of uniform terrain, Ruarch's proposal is unac-

ceptable. However, we believe that a narrowly limited exception to our general policy of assuming uniform terrain in allotment proceedings is warranted in this and similar cases.

8. We reject Ruarch's contention that *Bay Shore* compels the result in this case. *Bay Shore* differed from this case in a number of material respects. First, in *Bay Shore* we made a substandard allotment in order to provide a first local service that could not be otherwise provided. In this case, Ruarch only seeks to upgrade the class of a present allotment which fully complies with Commission rules. Although we recognize that public interest benefits do accrue from upgrades to facilities, the benefits that accrue are generally less than those from provision of a first local service, unless the upgraded facilities would provide first or second aural service to a substantial population. Second, in *Bay Shore* we found that there was no other possible use of the channel, whereas Ruarch has made no such showing.<sup>4</sup> Third, in *Bay Shore* we found that no other alternative transmitter sites were available and that the petitioner had presented sufficient evidence to enable the Commission to evaluate its requested waiver of the city grade coverage requirement. In this case, the petitioner has failed to show that no alternative transmitter sites are possible, and has not requested a waiver of the city grade coverage requirement. Therefore, *Bay Shore* is not dispositive.

9. Our decision to grant Ruarch's application for review is based on narrow grounds. Normally, the Commission does not evaluate specific terrain data in allotment proceedings. Instead, the Commission generally assumes that a station's city grade coverage contour is a circle with a defined radius from a hypothetical transmitter site. Thus, compliance with our city grade coverage requirement is determined by a simple distance calculation. If the far boundary of a community is farther than the length of the circle's radius from the closest hypothetical transmitter site, we will not make the allotment. At the application stage, however, the Commission recognizes that differences in the average elevation of terrain along radials from the transmitter site will affect the distance to a predicted contour. In determining whether the station provides adequate city grade coverage, at that stage the Commission will examine terrain along a radial from the transmitter site to the community of license, in accordance with our standard prediction methods.<sup>5</sup> In examining that radial, the Commission takes cognizance of the fact that if the average elevation as derived from our standard prediction methods along the radial to the community of license is generally less than the elevation along other pertinent radials from the transmitter site, the station's signal will extend farther along that radial than along other radials, and therefore farther than predicted using an assumption of uniform terrain. An applicant generally complies with our city grade coverage requirement if, based upon examination of the predicted distance to the city grade contour along the radial from its proposed transmitter facility, the Commission determines that the requisite signal strength will be supplied to the community of license. We do not undertake a similar analysis at the allotment stage, because we generally cannot determine what specific transmitter sites will ultimately be applied for, nor whether the petitioner will be the successful applicant.<sup>6</sup>

10. However, in this case the petitioner is not requesting a new allotment, but an upgrade to a higher class channel for an existing authorization. The Commission does not

accept competing applications for FM licenses or permits upgraded to a higher class adjacent or co-channel. Thus, if the proposal is adopted, we would not make the amended allotment available for general application.<sup>7</sup> Moreover, the petitioner has taken the affirmative steps of securing assurances from the proposed sites' owner that the transmitter site will be available, and has obtained FAA approval for a tower at the proposed site. The petitioner has also submitted substantial evidence that, using our standard prediction method, but relaxing the normal assumption of uniform terrain, its proposed facilities will comply with our principal city coverage requirement. A staff analysis confirms that from the petitioner's proposed site, petitioner will provide city grade coverage at a distance well beyond the community of Woodstock. Although we reiterate that the assumption of uniform terrain at the allotment stage is generally appropriate, we believe it would elevate form over substance to apply that assumption here, where the petitioner has taken the affirmative steps necessary to allow us to evaluate a specific site, and our rules insure that petitioner will be the only applicant for the allotment.<sup>8</sup>

11. In light of the above, we believe petitioner has demonstrated that all of Woodstock can be provided with a city grade signal. Thus, we find that petitioner has provided a basis for accepting its petition for Rule Making. Petitioner's Application for Review is hereby granted, and the staff is directed to initiate a rule making proceeding to determine if grant of the proposal would serve the public interest.

12. Accordingly, IT IS ORDERED, That the Application for Review filed by Ruarch Associates, IS GRANTED.

#### FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III  
Acting Secretary

#### FOOTNOTES

<sup>1</sup> See 47 CFR §§ 73.315(a), 73.333.

<sup>2</sup> The data originally submitted by the petitioner was for a site, at coordinates 38-44-36 and 78-45-18, 26.3 kilometers from Woodstock. The new coordinates, at 38-45-29 and 78-43-36, are for a site 23.4 kilometers from Woodstock. There is a difference of 2.9 kilometers between the first and second proposed sites.

<sup>3</sup> In *Bay Shore* we emphasized that the proposal to allot Channel 276A to Bay Shore, New York, was both unique and meritorious. The only site complying with the Commission's spacing requirements and local environmental concerns was located on the Fire Island Lighthouse. From this site, due to limitations placed on the transmitter height, the predicted 70 dbu signal would encompass only 45% of Bay Shore. We noted that the area between the lighthouse and Bay Shore consisted of water and the 70 dbu signal could be expected to extend further than predicted and possibly encompass Bay Shore. We also determined that the proposal would provide a first local service to a community of over 36,000 in population. We further pointed out that the proposal represented the only known possible use of this channel, no

alternative transmitter sites were available, and the proposal was consistent with efforts to restore and preserve the Fire Island Lighthouse.

<sup>4</sup> Indeed, in the rule making proceeding that will be initiated to determine if Ruarch's facilities should be upgraded, it may be concluded that the use of Channel 241 or an adjacent channel at another community would better serve the public interest.

<sup>5</sup> See 47 CFR § 73.313(d)(1)-(3). See also 47 CFR § 73.311(a),(b)(3).

<sup>6</sup> See *Greenwood, SC*, MM Docket No. 86-32, FCC 88-199 (released July 5, 1988).

<sup>7</sup> See 47 CFR § 1.420(g).

<sup>8</sup> Petitioners wishing in the future to take advantage of this exception to our normal assumption of uniform terrain should submit, in their petition for rule making, a full showing as to the terrain between the proposed site and their community of license, in accordance with our rules. In addition, petitioners should submit the same terrain data for eight radials from the transmitter site normally submitted with an application, in order to allow the Commission to confirm that the facility would comply with our maximum height above average terrain requirements. Finally, petitioners should indicate that they have reasonable assurances of site availability for the proposed site.